No. 94-1837

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

vs.

TOM GALLAGHER, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF INSURANCE, FLORIDA ASSOCIATION OF LIFE UNDERWRITERS, PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC., AND FLORIDA ASSOCIATION OF INSURANCE AGENTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 37.2 of this Court, this brief is respectfully submitted by The New York Clearing House Association (the "Clearing House") with the consent of all parties.

Interest of *Amicus Curiae*

The Clearing House is an unincorporated association of eleven commercial banks in New York City.[1] The Clearing

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, NatWest Bank N.A., European American Bank, and Republic National Bank of (continued...)

House frequently appears as *amicus curiae* in cases, such as this one, which raise important questions concerning the powers of its member banks.

The Clearing House has a significant interest in the questions presented by the petition for a writ of certiorari filed herein because of its member banks' interest and potential involvement in the sale of insurance products pursuant to 12 U.S.C. § 92 ("Section 92"). In an era of rapid consolidation of the financial services industry and increasing lack of differentiation among financial products, it is essential that commercial banks be permitted to offer insurance products to the extent authorized by Congress. State statutes and judicial interpretations that would limit that authority damage the Clearing House member banks and other members of the banking industry, harm consumers of financial services and are antithetical to our political and commercial system.

Moreover, unless this Court grants the petition, there will be confusion and uncertainty as to the ability of banks to sell insurance pursuant to Section 92 in numerous states that have laws similar to the Florida statute in question here or that may enact such laws in the future.

The Eleventh Circuit's decision below, *Barnett Bank, N.A.* v. *Gallagher*, 43 F.3d 631 (11th Cir. 1995) ("*Barnett Bank*"), upheld a Florida statute forbidding certain national banks to sell insurance. That decision is not only inconsistent with the plain meaning of the McCarran-Ferguson Act, 15

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[1](...continued)
New York. Four members of the Clearing House, The Chase Manhattan Bank, N.A., Citibank, N.A., NatWest Bank N.A., and Republic National Bank of New York, are national banks subject to the National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified, as amended, in sections of Title 12 of the United States Code, which includes 12 U.S.C. § 92, discussed herein).

U.S.C. § 1012(b), but squarely conflicts with the Sixth Circuit's earlier decision in *Owensboro National Bank* v. *Stephens*, 44 F.3d 388 (6th Cir. 1994) ("*Owensboro*"). Members of the Clearing House are directly affected by the decision below because of the uncertainty that it creates. There is now a question whether 12 U.S.C. § 92, the federal statute that "almost 80 years ago . . . authorized any national bank" to sell insurance, *United States Nat'l Bank* v. *Independent Ins. Agents of America, Inc.*, ____ U.S. ____, ____, 113 S. Ct. 2173, 2176 (1993), will be held effective in the face of a state statute that prohibits such sales.[2]

Statutes Involved

This case involves the interpretation of two federal statutes and one state statute, which read in relevant part as follows:

15 U.S.C. § 1012(b) (the McCarran-Ferguson Act)

"[N]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . ."

12 U.S.C. § 92

"In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such

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[2] In *United States National Bank*, the Court resolved another conflict regarding Section 92 among the Courts of Appeals when it held that Section 92 was in force and had not been repealed.

rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: Provided, however, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: And provided further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance."

Fla. Stat. ch. 626.988(2)

"No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency."[3]

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[3] "Specifically excluded from this definition ['Financial institution'] is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census." Fla. Stat. ch. 626.988(1)(a). Petitioner is a national bank subsidiary of a bank holding company, and as such does not benefit from this exclusion.

Summary of Argument

The Framers of the Constitution adopted a basic policy for this nation, designed to ensure against a balkanized and ultimately weakened economy, that matters of commerce should be the province of the Congress and not the individual states, U.S. Const. art. I, § 8, *see Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824), although Congress may cede its powers in specific instances to the states.

In the case of regulation of insurance, Congress has ceded certain powers to the states in the McCarran-Ferguson Act, but only under specified and limited circumstances. The McCarran-Ferguson Act establishes a two-part test for a state statute to be immune from federal preemption. First, the state statute must "regulate the business of insurance" before it may be enforced over a conflicting federal statute. Second, even if the state statute satisfies this first requirement, the federal statute will still preempt the state statute if the federal statute "specifically relates to the business of insurance."

The court below adopted the self-contradictory proposition that a state statute that *bars* banks and their affiliates from selling insurance is "regulation" of the business of insurance, but that a federal statute that *authorizes* the sale of insurance does not even "relate to" the business of insurance. As discussed below, the Clearing House believes that the court below was in error on both prongs of the McCarran-Ferguson test. In any event, it should be beyond doubt that the court below cannot be correct on both prongs. If a statute barring insurance sales "regulates" the business of insurance, then a statute specifically authorizing insurance sales must "relate to" that business.

The petition should be granted, first, because the first prong of the McCarran-Ferguson test has produced a conflict between the Sixth and Eleventh Circuits as to whether a state

statute that prohibits national banks from selling insurance is a "law enacted . . . for the purpose of regulating the business of insurance." The court below held that the Florida statute regulated the business of insurance; the Sixth Circuit in *Owensboro* held that the Kentucky law under scrutiny in that case was not such a statute. The two statutes are identical in substance in that they both would bar banks from the sale of insurance. These two holdings are clearly inconsistent interpretations of the McCarran-Ferguson Act, a conflict which the Court should resolve.

Second, although the McCarran-Ferguson Act clearly limits the ability of the states to override federal law, by stating that a federal law that specifically relates to the business of insurance will preempt a state statute that regulates the business of insurance, the Eleventh Circuit virtually ignored this limitation by an extraordinarily restrictive interpretation of the term "relates to." This interpretation added two requirements which are not contained in the statute. First, the court below ruled that, before according a federal statute such as Section 92 preemptive effect, the federal law must specifically require that the state statute yield to it. Second, the Eleventh Circuit held that a federal statute such as Section 92 must actually "regulate" the business of insurance, not just "relate to" that business. The Clearing House submits that the Eleventh Circuit was bound by the clear language of the McCarran-Ferguson Act, and that it was not entitled to add requirements that Congress did not adopt.

In view of the conflict between the Eleventh Circuit's interpretation of the second prong of the McCarran-Ferguson Act and the clear language of the statute, this Court should resolve the question of whether Section 92 relates to the business of insurance because, absent such resolution, another conflict between circuits and a petition to the Court to resolve that conflict is a virtual certainty.

The current conflict among the courts of appeals in interpreting the McCarran-Ferguson Act is creating great confusion about what federal law requires, state by state and circuit by circuit. Petitioner has identified 13 other states that have enacted legislation similar to the statutes in Florida and Kentucky. (Pet. at 6 & n.1.) These 13 states are located in seven different judicial circuits, at least five of which have not yet addressed the issue. Other states may consider such legislation in the future. Whatever the Court's decision on the merits, there is a compelling need for certainty about what the federal law now requires. The petition should be granted.

ARGUMENT

I.

There is a Clear Conflict Among the Circuits on the Issues Presented by the Petition.

The Eleventh Circuit's decision below directly contradicts the Sixth Circuit's interpretation of the McCarran-Ferguson Act in *Owensboro*, as well as the Third Circuit's decision nearly a decade ago in *United Services Automobile Association* v. *Muir*, 792 F.2d 356, 364 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) ("*Muir*").[4]

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[4] In *Muir*, the court was faced with the question whether a federal court should abstain from review of a supremacy clause challenge to a Pennsylvania statute that prohibited issuing an insurance license to an affiliate of a lending institution. The court of appeals, applying the standards articulated by this Court in *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119, 129 (1982), rejected the district court's conclusion that abstention was appropriate because McCarran-Ferguson gave the states exclusive control over the regulation of insurance. The Third Circuit held that state laws that forbids banks from selling insurance "have no part in the business of insurance under McCarran-Ferguson." *Muir*, 792 F.2d at 364.

The Eleventh Circuit decided that the McCarran-Ferguson Act requires that Section 92, a federal statute that authorizes national banks to sell insurance, must yield to a Florida statute that prohibits such sales by national banks, such as the petitioner, that are subsidiaries of bank holding companies.

In order to reach this conclusion, the Eleventh Circuit first had to determine that a total ban on bank sales of insurance constituted "regulation" of insurance. Although "regulation" and "prohibition" are different and not synonymous terms,[5] the Eleventh Circuit ignored this difference. Instead, the court below merely recited this Court's formulation of the issue in *United States Department of Treasury* v. *Fabe*, ___ U.S. ___, 113 S. Ct. 2202 (1993) ("*Fabe*"),[6] *i.e.*, whether the state statute regulated policyholders and their relationship to the insurance company, and then concluded that a prohibition of sales of insurance by financial institutions fit within that description, even though the prohibition meant that there was nothing to regulate.

The Sixth Circuit in *Owensboro* held that the Kentucky statute at issue there did not regulate the business of insurance.[7] *Owensboro*, 44 F.3d at 391-92. Unlike the

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[5] Indeed, Black's Law Dictionary draws an explicit distinction between regulation and prohibition, defining the word "prohibit" as "[t]o forbid by law; to prevent; — *not synonymous with 'regulate.'*" Black's Law Dictionary 1212 (6th ed. 1990) (emphasis added). If the activity is prohibited, there is nothing to regulate.

[6] *Fabe* held that an Ohio statute regulated the business of insurance where it directed the payment of an insolvent insurer's assets to policyholders in preference to other creditors.

[7] The *Owensboro* court considered a Kentucky "anti-affiliation" statute, Ky. Rev. Stat. Ann. § 287.030(4), which was similar to the Florida statute at issue in the present case:

(continued...)

Eleventh Circuit, the *Owensboro* court examined both the *Fabe* decision and the Court's three-part test from *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982) ("*Pireno*").[8] It concluded that the Kentucky statute did not regulate the "business of insurance," as defined by the *Pireno* criteria, but rather *excluded* entities that were not in the "business of insurance," *i.e.*, banks. *Id.* at 392. Stressing the distinction between regulating an entity's conduct and excluding it from engaging in any conduct at all, the *Owensboro* court held that the state statute could not preempt federal law because it failed the first prong of the McCarran-Ferguson Act test. *Id.* Section 92 thus governed under traditional federal preemption principles. *Id.*

Like the statute at issue in *Owensboro*, the Florida statute considered by the Eleventh Circuit does not seek to control or regulate the manner in which the sale of insurance is conducted. There are no licensing requirements or restrictions on the manner of sale. Rather, the Florida statute flatly bars almost all banks from the sale of insurance.

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[7](...continued)

> "No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgagee in mortgage property, other than title insurance."

[8] In *Pireno* the Court held that the three criteria for identifying the "business of insurance" for purposes of the McCarran-Ferguson Act are "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and insured; and *third*, whether the practice is limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129 (emphasis in original).

In its opinion below, the Eleventh Circuit did not even mention, much less seek to distinguish, *Pireno*, *Owensboro* or *Muir*.

This case thus presents the Court with an opportunity to resolve divergent interpretations of the McCarran-Ferguson Act that have created substantial confusion in the rapidly evolving and increasingly competitive financial services industry. Banks cannot determine whether to make strategic investments in insurance operations. The Eleventh Circuit's ruling, at odds with the Sixth Circuit's decision in *Owensboro* and the Third Circuit's decision in *Muir*, has introduced considerable uncertainty as to the right of banks to sell insurance pursuant to Section 92 in numerous states. The Court should grant the petition to resolve this split among the circuits before additional courts and legislatures are forced to choose sides, creating even greater uncertainty and inconsistency for banks and insurance agents across the country.

II.

The Eleventh Circuit Also Applied an Erroneous Standard to Determine Whether Section 92 Specifically Relates to Insurance Under the Second Part of the McCarran-Ferguson Test.

The Court also should grant the petition to resolve the issue whether the Eleventh Circuit properly applied the second part of the McCarran-Ferguson Act preemption test, *i.e.*, whether Section 92 specifically relates to the business of insurance. 15 U.S.C. § 1012(b). The court below failed to apply the standard developed by Congress, and instead imposed its own requirements that the federal statute must also regulate insurance or must specifically require preemption of the state statute. The Eleventh Circuit thus impermissibly altered the balance that Congress struck between federal law and state regulation of insurance.

In its effort to deny the applicability of the "specifically relates to" test of McCarran-Ferguson to Section 92, the

Eleventh Circuit focused first on a *dictum* in the *Fabe* opinion that state statutes that regulate insurance "do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." ___ U.S. at ___, 113 S. Ct. at 2211.[9] The fatal flaw in applying "specific preemption" as a standard is that this is not what the statute says. A specific preemption requirement is included in some federal statutes, *see, e.g.*, 17 U.S.C. § 301(a) (Copyright Act of 1976); 15 U.S.C. § 1334(b) (Federal Cigarette Labeling and Advertising Act); it is conspicuous by its absence in McCarran-Ferguson.

The Eleventh Circuit then concluded that Section 92 does not "specifically require" preemption of conflicting state statutes because it does not regulate the business of insurance. Such a conclusion, however, defies plain meaning, common sense and the teachings of this Court.

Stated simply, "regulates" is not a synonym or substitute for "relates to." Although a statute which regulates a matter also relates to that matter, the converse is not true. The term "relates to" is considerably broader than "regulates," and many statutes relate to a subject without necessarily regulating it. While a statute may regulate only one line of business, the same statute may relate to other lines of business. Thus, by substituting its own wording for the language chosen by Congress, the Eleventh Circuit failed altogether to address the real issue under the statute.

The Eleventh Circuit's casual substitution of the verb "regulate" for the statutory word "relate" narrowed the category of federal statutes which satisfy the second prong of the McCarran-Ferguson Act. A statute which "regulates" an

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[9] There clearly was no issue presented in *Fabe* about whether the federal statute under consideration there related to the business of insurance. ___ U.S. at ___, 113 S. Ct. at 2208 ("The parties agree that . . . the federal priority statute does not 'specifically relate to the business of insurance'").

activity defines and shapes the conduct which comprises that activity. *See Owensboro*, 44 F.3d at 392. But as this Court's precedents establish, a statute "relates to" an activity even if it has only an indirect link to it. *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, ___ U.S. ___, ___, 114 S. Ct. 517, 525-26 (1993); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).[10]

Moreover, had Congress intended for the first and second prongs of the McCarran-Ferguson test to be identical in meaning, it would have used the same term, *i.e.*, either "relates to" or "regulates," twice. Congress' use of the different terms in the same sentence clearly connotes its intention to impart different meanings.[11]

The Eleventh Circuit's analysis of Section 92 in the context of the McCarran-Ferguson Act also merits review by the Court.

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[10] The Eleventh Circuit's substitute language is particularly egregious in view of this Court's conclusion that Congress' use of the word "relates" should be construed to sweep in a broad category of activities and practices. *See John Hancock Mut. Life Ins. Co.*, ___ U.S. at ___, 114 S. Ct. at 525 (holding that ERISA "obviously and specifically relates to insurance") (internal quotations omitted); *Morales*, 504 U.S. at 383 (holding that the term "relating to" in a federal statute "express[es] a broad pre-emptive purpose").

[11] Furthermore, even if the term Congress used in the second prong had been "regulate," Section 92 specifically regulates. For example, it explicitly calls for "rules and regulations" to be issued by the Comptroller, it provides for fees and commissions to be governed by contract, and it limits insurance sold to policies issued by companies authorized by the relevant state to conduct business.

III.

The Petition Presents Issues of National Importance to Banks, Insurance Agents, and Banking and Insurance Customers Across the Country.

National banks across the country engage in the sale of insurance pursuant to Section 92. The Office of the Comptroller of the Currency has testified that approximately 179 national banks sell insurance in reliance on this section, *see Owensboro Nat'l Bank* v. *Moore*, 803 F. Supp. 24, 30-31 (E.D. Ky. 1992), *aff'd sub nom. Owensboro Nat'l Bank* v. *Stephens*, 44 F.3d 388 (6th Cir. 1994), and the fees generated by the sale of insurance already are an important source of revenue for national banks, both large and small, *see* Yvette D. Kantrow, *Small Banks Betting on Insurance; Experience with Product Has Paid Off, Survey Finds*, The American Banker, Jan. 29, 1991, at 6. Banks likely would expand the services they offer their customers to include insurance sales, if a stable legal environment existed to support such expansion. *See* Jaret Seiberg & Karen Talley, *Dismantling Glass-Stegall: Banks Yearn to Round Out Product Lines With Insurance, But Prospects Are Unclear*, The American Banker, Mar. 23, 1995, at 1, 15 (reporting that a bank's profits from the sale of life insurance policies alone "could range from hundreds of thousands of dollars to millions").

But the confusion created by the current split in the circuits is a powerful disincentive to expansion of insurance services. Petitioner identifies 15 states (including Florida and Kentucky) which have enacted statutes purporting to limit the power of banks to sell insurance in communities of less than 5,000 residents. (Pet. at 6 & n.1.) In this environment, the Eleventh Circuit's decision has the effect of creating a patchwork regime, in which a bank's power to sell insurance

turns arbitrarily on whether the state falls within the jurisdiction of the Eleventh, the Sixth or another circuit court of appeals, and on whether the state has enacted or may choose to enact a statute purporting to so limit the bank's powers.

In the Sixth Circuit, the statutes enacted by Kentucky and, presumably, by Tennessee have been held preempted by Section 92, and Michigan and Ohio are unlikely to enact such legislation in the face of the *Owensboro* ruling. In the Eleventh Circuit, now that the Florida statute has been upheld, Alabama and Georgia could enact similar legislation. The fate of the laws enacted by at least ten of the 12 other states with such statutes now on the books would await a determination by the courts with jurisdiction over them.[12] National banks that wish to sell insurance pursuant to Section 92 in those states will have to file lawsuits in the appropriate federal courts. In the remaining states, financial institutions may not be barred presently from doing such business, but clearly they are deterred from offering such services by the knowledge that they will have to file and prosecute lawsuits to protect that business if a state enacts such legislation.

In all but a few states, therefore, banks may sell insurance only at their own risk. *See, e.g.*, Jaret Seiberg, *Docket: A Maze of Rulings Leaves Banks Guessing On Insurance Power*, The American Banker, Feb. 15, 1995, at 3 ("Until the Supreme Court decides the issue, bankers must accept that their authority to sell most insurance and annuity products is tenuous"). Needless to say, the uncertainty

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[12] These states are in the First Circuit (Maine, Massachusetts, New Hampshire and Rhode Island), Second Circuit (Connecticut and Vermont), Fourth Circuit (West Virginia), Fifth Circuit (Louisiana and Texas) and the Ninth Circuit (Nevada). Presumably the Third Circuit's ruling in *Muir* would result in rulings invalidating the similar statutes enacted in New Jersey and Pennsylvania.

created by the split in the circuits will cause banks to hesitate before offering insurance products to their customers. Resolution of the split in the federal circuits would thus benefit banks, and their customers, nationwide.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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